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In The

Supreme Court of the United States

October Term, 1993

JUDY MADSEN, SHIRLEY HOBBS and ED MARTIN,

Petitioners,

v.

WOMEN'S HEALTH CENTER, INC., *et al.*,

Respondents.

On Writ Of Certiorari
To The Supreme Court Of The State Of Florida

BRIEF OF AMICUS CURIAE AMERICAN FAMILY ASSOCIATION IN SUPPORT OF PETITIONERS

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CONSENT OF THE PARTIES

Attorneys for Petitioners and Respondents have consented to the filing of an amicus curiae brief by American Family Association. (Appendix A).

INTEREST OF AMICUS CURIAE

American Family Association ("AFA") is a not-for-profit corporation founded in 1987. AFA exists for the purpose of disseminating information and educational materials regarding traditional family values. Through its legal arm, the American Family Association Law Center, AFA participates in cases relating to First Amendment religious freedom and free speech issues, and to cases relating to the preservation of traditional moral values of American society. Amicus curiae American Family Association is not a party to this litigation.

SUMMARY OF ARGUMENT

This case raises a question of the conflict between an Amended Permanent Injunction (hereinafter the "Injunction"), entered April 8, 1993, by the Honorable Robert D. McGregor, Circuit Judge, in the Eighteenth Judicial Circuit of Florida against Petitioners, and the provisions of the First Amendment to the United States Constitution.

Specifically, the Injunction prohibits Petitioners, "and all persons acting in concert or participation with them, or on their behalf, with notice in any manner or means"

from *inter alia* "congregating, picketing, patrolling, demonstrating or entering that portion of the public right-of-way or private property within thirty-six (36) feet of the property line of the Clinic"; during specified hours "from singing, chanting, whistling, shouting, yelling, use of bullhorns, auto horns, sound amplification equipment or other sounds or images observable to or within earshot of the patients inside the clinic"; at all times "within three hundred (300) feet of the Clinic, from physically approaching any person seeking the services of the Clinic unless such person indicates a desire to communicate by approaching or inquiring of the Respondents . . . " in which case the communications of Petitioners are limited by the Injunction to "conversation of a non-threatening nature and by delivery of literature within the three hundred (300) foot area but in no event within the 36 foot buffer zone." The Injunction further prohibits persons, at any time, from "approaching, congregating, picketing, patrolling, demonstrating or using bullhorns or other sound amplification equipment within three hundred (300) feet of the residence of any of [the Clinics'] employees, staff, owners or agents . . . ".

Both the United States Court of Appeals for the Eleventh Circuit[1] and the Florida Supreme Court[2] have ruled on the subject Injunction, arriving at starkly contrasting results. Despite the fact that the Eleventh Circuit Court of Appeals had determined that the restriction imposed by

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[1] *Cheffer v. McGregor*, 6 F.3d 705 (11th Cir. 1993).

[2] *Operation Rescue v. Women's Health Ctr., Inc.*, 626 So.2d 664 (Fla. 1993).

the Injunction, in a traditional public forum, was a viewpoint based restriction on free speech, and thus was not sufficiently narrowly drawn to satisfy the constitutional tests applied by this Court, the Florida Supreme Court found the same wording to be content-neutral, and a valid regulation of the time, place and manner of speech.

This brief of amicus curiae is of limited focus. It addresses the fact that the interpretation of the Injunction by the Florida Supreme Court applied the incorrect standard of review to restrictions on speech in a traditional public forum, and failed to require that such a restriction be narrowly tailored in accordance with the principles enumerated by this Court. This brief does not address the other compelling legal arguments raised by Petitioners in their Opening Brief, or by other amici on behalf of Petitioners. It focuses only on the First Amendment issues raised by the requirement that such restrictions be narrowly tailored to achieve compelling state interests.

Because the decision of the Florida Supreme Court here under review failed to apply such standards or to require such narrow tailoring of restrictions, the decision of the Florida Supreme Court must be reversed.

ARGUMENT

I.

THE INJUNCTION FAILS TO DISTINGUISH BETWEEN LAWFUL AND UNLAWFUL EXPRESSIVE CONDUCT, AND IS NOT NARROWLY TAILORED TO THE PRECISE NEED OF THE CASE

A. The Injunction Converts a Traditional Public Forum Into a "First Amendment Free Zone"

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech. . . ."[3] The activities of Petitioners made subject to the Injunction, i.e., picketing, demonstrating, singing, chanting, whistling, shouting, yelling, and seeking to communicate with others, are, without question, expressive activities involving speech protected by the First Amendment. *United States v. Grace*, 461 U.S. 171 (1983); *Carey v. Brown*, 447 U.S. 455 (1980); *Gregory v. Chicago*, 394 U.S. 111 (1969); *United States v. O'Brien*, 391 U.S. 367 (1968); *Thornhill v. Alabama*, 310 U.S. 88 (1940).

> It is also true that "public places" historically associated with the free exercise of expressive activities, such as streets, sidewalks, and parks, are considered, without more, to be "public forums." [Citations omitted].
> *United States v. Grace*, 461 U.S. 171, 177 (1983).

In a "public forum", the government's ability to restrict expressive conduct is very limited. *Id.*

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[3] The full text of the First Amendment is set forth in Appendix B.

As the Court noted in *Grace*, property which falls in the category of a traditional public forum occupies a special position in terms of First Amendment protection. 461 U.S. at 180. "Sidewalks, of course, are among those areas of public property that traditionally have been held open to the public for expressive activities and are clearly within those areas of public property that may be considered, generally without further inquiry, to be public forum property." *Grace*, 461 U.S. at 179.

This Court has repeatedly recognized that peaceful expressive activities, such as those of Petitioners in communicating their views through demonstrations, picketing and the other forms of communication enumerated in the Injunction, are subject to the highest levels of First Amendment protection. Expression on public issues "has always rested on the highest rung of the hierarchy of First Amendment values." *Carey v. Brown*, 447 U.S. 455, 467 (1980). "[S]peech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964). This Court has repeatedly "recognized that the First Amendment reflects a single 'profound national commitment' to the principle that 'debate on public issues should be uninhibited, robust and wide-open'." *Boos v. Barry*, 485 U.S. 312, 318 (1988) (citations omitted). The Court has "consistently commented on the central importance of protecting speech on public issues." *Id.; see Connick v. Myers*, 461 U.S. 138, 145 (1983); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913, 926-27 (1982) (political speech lies "at the core of the First Amendment").

Moreover, "the Constitution protects expression and association without regard . . . to the truth, popularity, or

social utility of the ideas and beliefs offered." *NAACP v. Button*, 371 U.S. 415 (1963). "It is elementary, of course, that in a case of this kind the courts do not concern themselves with the truth or validity of the publication." *Organization For a Better Austin v. Keefe*, 402 U.S. 415 (1971).

Despite this Court's long history of upholding the cherished rights to free expression on significant issues of vital public importance, the Injunction in question, upheld by the Florida Supreme Court, seeks to transform the traditional public forum, where debate should be "uninhibited, robust and wide-open" to a forum in which all dissent is gagged and all but sympathetic communication is stifled.

By its terms, the Injunction creates two zones, free from First Amendment protected expression (the content of which is undesirable), around the abortion clinic of respondents, and additional zones around the residences of those affiliated with respondents.

Such an order, if upheld, turns more than two hundred years of First Amendment jurisprudence on its head. Rather than encouraging open and robust debate in the public square, it requires public speech to be kept from the public square. Rather than encouraging open, vigorous and robust debate, the Injunction requires dissenters to keep their thoughts to themselves. Rather than the government zealously protecting against abridgment of freedom of speech, the Injunction protects freedom *from* speech.

B. The History of Our Nation Includes Cherished Freedoms of Dissent by Protest

An important part of our national history is the right to protest societal wrongs through nonviolent protest. Such expression has served as an effective means of illustrating a moral witness within society against perceived injustices. *See generally* Martin Luther King, Jr., *Letter from Birmingham City Jail* (1963). In fact, advocates of the pro-choice industry, in their continuing efforts to persuade and lobby government through civil disobedience have also protested to the point of arrest to assert their views.[4] Examination of several important movements in this country's history, and of a highly effective, nonviolent contemporary movement, demonstrates the effectiveness of traditional civil obedience.

1. The Abolitionist Movement

In 1833, the American Anti-slavery Society resolved that its members would not resort to physical force or violence in order to vindicate the rights of those trapped in slavery. Throughout the early 1800's, the Abolitionists typically distributed newsletters advocating freedom for slaves, and they conducted organized campaigns to teach slaves how to read and write. Although the acts committed by the Abolitionists were crimes in the southern

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[4] Patricia Ireland, President of NOW, was arrested for her civil disobedience while protesting the Clinton administration's policy relating to lesbians and gays in the military service. *See* Cindy Loose, *Former Clinton Advisor Arrested in Gay-Rights Protest at White House*, Wash. Post, July 31, 1993, at A5.

states, the movement was largely nonviolent and directed to right a societal wrong which would have gone unchanged if voices of dissent were quieted. The Petitioners before this Court desire to publicly express their view that abortion is morally reprehensible. To quiet their voices simply because some segments of society disagree would merely abolish the very protection the First Amendment seeks to keep vitally alive within our society.

2. The Woman's Suffrage Movement

From its inception in the early 1870's, the Woman's Suffrage Movement was dedicated to obtaining voting rights for women in the United States. The Movement's activities were calculated to educate the public and included speeches, rallies, demonstrations, publications of a newspaper titled *The Revolution*, and distribution of leaflets and circulars.[5] As part of the Movement, some activists went beyond mere speech and engaged in activities of civil disobedience.

In 1917, some activists commenced an aggressive campaign of picketing the area around the White House to send the resident, President Wilson, as well as the nation, the message that women would not be denied the franchise. These protests led to their arrest on charges of "blocking traffic" and participating in an unlawful assembly.[6] In addition, the activists set illegal fires as "symbolic

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[5] *See* Eleanor Flexmer, *Century of Struggle* 149, 153 (1975).

[6] *Woman Arrests Suffrage Pickets* N.Y. Times, June 23, 1917, at 9.

watch fires for freedom" outside the White House lawn.[7] Moreover, several of the activists were arrested, along with Susan B. Anthony, when they attempted to register to vote in violation of the Act of May 31, which criminalized knowingly voting without having the right to vote. *See United States v. Anthony*, 24 F.Cas. 829 (C.C.N.D.N.Y. 1873).

3. Sit-ins and the Civil Rights Movement

The demonstrations of the '60's also included both expressive speech and acts of civil disobedience. Again, although some elements of the movement were involved with isolated violent acts, the theme of the movement was nonviolent civil disobedience to correct a societal wrong. Those engaging in lunch counter sit-ins did not use violence to compel restaurants to close.

The sit-ins were calculated to be nonviolent, and the activists went to extraordinary lengths to accomplish that result. The sit-ins at all-white lunch counters in the South began in February, 1960 in Greensboro, South Carolina, and participation in this highly visible and effective protest activity spread so rapidly that by October of that year there had been sit-ins in 112 southern cities.[8] At first disorganized, the sit-ins were soon being orchestrated by such groups as the Congress of Racial Equality and the Southern Christian Leadership Conference led by Dr.

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[7] Linda G. Ford, *Iran-Gerald Angels*, 236, 238 (1991).

[8] Juan Williams, *Eyes on the Prize* 140 (1987).

Martin Luther King, Jr. All of these organizations consistently advocated nonviolent civil disobedience to gain recognition for their movement. As such, the majority of the protesters, despite intense provocation by white segregationists,[9] followed the credo of nonviolence.

Indeed, many decisions of this Court noted the peaceful expression, even politeness, of the sit-in protests. *See Lombard v. Louisiana*, 373 U.S. 267, 268 (1963) (restaurant manager stated that protesters "did not cause any disturbance, . . . were orderly . . . "); *Peterson v. City of Greenville*, 373 U.S. 244, 247 (1963) ("[t]he manager and the police conceded that the petitioners were clean, well dressed, unoffensive in conduct, and that they sat quietly in the corner. . . . "); *Barr v. City of Columbia*, 378 U.S. 146, 150 (1964) (overturning a breach-of-peace conviction on the ground that "petitioners were polite, quiet, and peaceful from the time they entered the store to the time they left").

4. The Gay Rights Movement

As with the pro-life movement, gay rights activists have achieved their success in the last decade almost entirely through protected conduct – public education, and grass-roots political organizing to support or oppose

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[9] A student who participated in one such sit-in described an attack by white teenagers: "[they] stood in the aisles insulting us, blowing smoke in our faces, grinding out cigarette butts on our backs and finally pulling us off our stools and beating us. Those of us pulled off our seats tried to regain them as soon as possible, but none of us fought back in anger." Williams, *supra*, at 133 (citations omitted).

political candidates, legislation and referenda. The principal national organizations embodying the movement over the years have advocated seeking change, and have sought change, without advocating violence. Like all movements of civil disobedience, however, some elements within those organizations have perpetrated acts which would be considered unlawful and offensive to those in society.

Like the many movements of civil disobedience throughout our country's history, persons within our society also feel that abortion is morally reprehensible. For the First Amendment to fail now, society as a whole would fail and be disparaged rather than merely those within the pro-life movement. To snuff out speech merely because it is offensive to some, would be the first step in creating a government, and nation, which would no longer tolerate disagreeable speech. To penalize the Petitioners merely because of their beliefs, regardless of the peaceful conduct with other civil disobedience, would eviscerate this Court's long held tradition of First Amendment protection.

C. Narrow Tailoring of Remedy Requires Distinction Between Lawful and Unlawful Expressive Conduct

The Injunction purports to prohibit peaceful demonstrations, picketing, distribution of literature, prayer, counseling and other communicative activities within the "First Amendment Free Zones" which it creates. The

failure of the Injunction to distinguish between expressive conduct which is lawful and that which is unlawful[10] is a failure to narrowly tailor the remedy to protect the constitutional rights of Petitioners, and thus renders the Injunction unconstitutional.

This Court has unanimously held that "peaceful assembly for lawful discussion cannot be made a crime." *De Jonge v. Oregon*, 299 U.S. 353, 365 (1937). However, an injunction carries with it the possibility of arrest and attendant criminal penalties. Thus, criminalization of unpopular speech is precisely the effect of the Injunction at bar.

The speech of Petitioners serves to communicate their views on the important public issue of abortion, and to persuade those in the vicinity. This may (indeed Petitioners undoubtedly desire that it will) result in others taking action in response to the persuasive communications, such as changing their own views, and declining to obtain an abortion. However, the protected character of speech is not lost, simply because it may embarrass others or coerce them into action. *Claiborne Hardware*, 458 U.S. at 910.

> As Justice Rutledge, in describing the protection afforded by the First Amendment, explained: "It extends to more than abstract discussion, unrelated to action. The First Amendment is a charter for government, not for an institution of learning. 'Free trade in ideas' means free trade

[10] Or, as in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982), to distinguish between expressive conduct which is violent, and that which is non-violent. 458 U.S. at 918.

> in the opportunity to persuade to action, not merely to describe facts." *Thomas v. Collins*, 323 U.S. 516, 537, 89 L.Ed. 430, 65 S.Ct. 315. *Claiborne Hardware*, 458 U.S. at 910.

Thus, the fact that the objective of Petitioners may be to persuade, even to persuade to action, does not divest the expressive conduct of its protected nature.

It may be arguable that some of the activities enjoined herein may be unlawful, although the Injunction does not so state, and the Florida Supreme Court makes only passing reference to the state's interest in assuring the public safety and order.[11] Under this Court's precedent, if all of the activities are lawful methods of communication, then the only valid restriction which this Court has ever permitted would be a reasonable time, place and manner restriction, content-neutral, and narrowly tailored to serve a significant government interest, leaving open ample alternative channels of communication. *United States v. Grace*, 461 U.S. 171, 177 (1983); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 915 (1982).

Even if it can be argued that some part of the activities enjoined herein are unlawful, the requirement of narrow tailoring of such a restriction compels a distinction between lawful and unlawful activities in the remedy fashioned by the court. As the Court has indicated in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), in the context of protected expressive activities, courts may "restrain only unlawful conduct and the persons responsible for conduct of that character." *Id.* at 924, n. 67. The

[11] None of the enjoined activities are even alleged to be violent.

permissible scope of state remedies in the area of free speech coupled with conduct "is strictly confined to the direct consequences of such [violent] conduct and does not include consequences resulting from associated peaceful picketing or other . . . activity." *Id.* at 918, *quoting United Mine Workers v. Gibbs*, 383 U.S. at 729.

A comparison of the facts of *Claiborne Hardware* with the instant case is instructive. In *Claiborne Hardware*, injunctive relief was sought for interference with the business relationships of various merchants because of a boycott by members of the black community of businesses owned by whites. The economic boycott urged and carried out by civil rights leader Charles Evers, and his followers, involved "acts of *physical force* and *violence*" against customers of the white-owned businesses, "*[i]ntimidation, threats, social ostracism, vilification*, and . . . the *stationing of guards* in the vicinity of white-owned businesses," all of which resulted in black persons being compelled, against their will, to withhold their trade from the boycotted stores. 458 U.S. at 894-95 (emphasis added). The Court made reference to a finding of some ten incidents that "strikingly" revealed the "atmosphere of fear" which prevailed throughout the time frame. "In two cases, shots were fired at a house; in a third, a brick was thrown through a windshield; . . . ." 458 U.S. at 904. Other incidents involved shots being fired into a home, a fight, slashing of tires and threatening telephone calls. 458 U.S. at 905-06.

Notwithstanding the activities which this Court characterized as unlawful, the Court reversed the damages award and injunction, observing that the view that the unlawful portion of the expressive conduct justified the

judicial prohibition of all the expressive conduct "accords insufficient weight to the First Amendment's protection of political speech and association." 458 U.S. at 914-915. Thus, the Court found that the injunction "must be modified to restrain only unlawful conduct and the persons responsible for the conduct of that character." *Id.* at 924, n. 67.

In the instant case, the Florida Supreme Court made reference to the state interest in ensuring the public safety and order, and "specific abuses" identified in the injunction. The Florida Court also indicated that reliance upon *NAACP v. Claiborne Hardware Co.* was misplaced, since the sole issue then before this Court was damages. 626 So.2d at 675, n. 8. However, this reasoning is not only based on an erroneous understanding of *Claiborne Hardware*, but an inadequate analysis of the principles of free speech, as well. As indicated in *Claiborne Hardware*, this Court specifically addressed the injunctive relief of the Mississippi Chancery Court. *See, e.g.*, 458 U.S. 907-915, 924 and n. 67. In addition, while a damages claim may be appropriate in circumstances where speech is not protected, such as cases of defamation and the like, injunctive relief acts as a prior restraint, and is thus subject to a much higher standard of scrutiny. *Organization For a Better Austin v. Keefe*, 402 U.S. 415 (1971); *Near v. Minnesota*, 283 U.S. 697 (1931). Indeed, as the Court articulated in *Claiborne Hardware*:

> While a State legitimately may impose damages for the consequences of violent conduct, it may not award compensation for the consequences of nonviolent, protected activity. Only those losses proximately caused by unlawful conduct may be recovered.
> 458 U.S. at 918.

Because the "First Amendment Free Zones" established by the Injunction at bar draw no distinction between expressive conduct which is lawful or unlawful, violent or nonviolent, the Injunction is unconstitutional.

II.

THE INJUNCTION IS NOT NARROWLY TAILORED TO AVOID IMPERMISSIBLE RESTRICTIONS ON SPEECH

A. Under a Time, Place and Manner Analysis, The Injunction is Not Narrowly Tailored to Avoid Constitutional Conflicts

As set forth below, an analysis based upon time, place and manner should not be indiscriminately applied to substantive injunctions like the one at issue here. However, even under such an analysis, this Injunction should not be permitted to stand.

In the context of public places historically associated with the free exercise of expressive activities, such as streets, sidewalks and parks (i.e., "public forums"), "the government's ability to permissibly restrict expressive conduct is very limited: the government may enforce reasonable time, place, and manner regulations as long as the restrictions 'are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.' [Citations omitted]". *United States v. Grace*, 461 U.S. 171, 177 (1983). Restrictions which go further, such as an absolute prohibition on particular types of expression, will be upheld only if narrowly drawn to accomplish a compelling governmental interest. *Id.; Perry Education Assn. v. Perry Local*

Educators Assn., 460 U.S. 37, 46 (1983); *Widmar v. Vincent*, 454 U.S. 263 (1981).

The reasonableness of a time, place and manner restriction depends, significantly, upon the "nature of a place, the 'pattern of its normal activities' . . . . The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time." *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972). *Grayned* involved a challenge to an anti-noise ordinance. While acknowledging that reasonable time, place and manner restrictions may apply to a city ordinance, the Court cautioned that such restrictions could not be applied to censor the speaker's message. Thus, access to public places for the purpose of exercising First Amendment rights could not broadly be denied. "Free expression 'must not, in the guise of regulation, be abridged or denied.' " *Id.* at 117.

Applying the Court's analysis from *Grayned* to the instant case, it becomes clear that enforcement of the injunctive First Amendment Free Zones against Petitioners' peaceful and quiet picketing, counseling, praying and demonstrating is not a *reasonable* restriction on the time, place or manner of expression.

Indeed, the terms of the Injunction in this case amount to a total ban on Petitioners' communicative activity within the First Amendment Free Zones created. An injunction "which totally bans the specified communicative activity . . . cannot be justified as a reasonable place restriction primarily because it has an insufficient nexus with any of the public interests . . . " upon which it is based. *Grace*, 461 U.S. at 181.

The Injunction, by its terms, indicates that the justification for the restrictions is the impact on traffic and noise, and the asserted interference with a woman's freedom to seek medical services in connection with aborting her child, as well as insuring the public safety and order. 626 So.2d at 672.

As this Court stated in *Grace*:

> We do not denigrate the necessity to protect persons and property or to maintain proper order and decorum . . . , but we do question whether a total ban [on the methods of communication] substantially serves these purposes. 461 U.S. at 182.

As in *Grace*, there is no suggestion here, for example, that Petitioners, themselves, obstructed the public sidewalks or access to the property, threatened injury to any person or property, or in any way interfered with the orderly administration of the property. "A total ban on the specified conduct is no more necessary for the maintenance of peace and tranquility on the subject property than on any other public property in the city." 461 U.S. at 182.

B. A Substantive Injunction Must Be Narrowly Drawn to Avoid Violation of the Separation of Powers Doctrine

The decisions of this Court have reflected a great reluctance to uphold an injunction imposing substantive restrictions on expressive activity. Indeed, the Court's decisions permitting restriction on the basis of time, place

and manner analysis appear to have involved only statutes, ordinances and regulations. *See, e.g., Cox v. Louisiana*, 379 U.S. 559 (1965) (statute); *Frisby v. Schultz*, 487 U.S. 474 (1988) (ordinance); *Clark v. Community For Creative Non-Violence*, 468 U.S. 288 (1984) (regulations). The decisions of this Court reflect several reasons for disfavoring the use of substantive injunctions against free speech. These considerations reflect the wisdom of preserving the constitutional distinction between the lawmaking role of elected bodies and the adjudicative role of courts.[12]

First, a statute or ordinance applies uniformly, while an injunction imposes special legal restrictions only upon a particular group of people. The injunctive creation of substantive offenses therefore inherently results in unequal legal treatment. That is, even if an injunction is content-neutral, it relates only to communicative activities as to a particular subject matter or location. Those engaging in precisely the same activity at a different location, or engaging in different activities at the same location are not subject to an injunction, although they would be subject to a statute or ordinance with exactly the same provisions.

Second, those alleged to have violated an ordinance retain the full panoply of due process rights and substantive defenses. Those alleged to have violated an injunction, by contrast, face summary contempt proceedings with virtually no opportunity to challenge the underlying restrictions or raise any defense other than denial of the

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[12] U.S. Const., Art. I, Sec. 1.

alleged acts. *E.g., Walker v. Birmingham,* 388 U.S. 307 (1967). Legislation by injunction, therefore, is akin to the imposition of martial law. Such a means of governance is repugnant to our system of republican democracy.

Third, the task of a court is to examine a law for constitutionality and/or apply it to factual circumstance, not to draft laws. When a judge issues a substantive injunction, one level of judicial review is effectively removed. A challenge to the constitutionality of a statute, regulation or ordinance is viewed first by a trial court, then on appeal, as appropriate. In an injunctive setting, the first opportunity for review by one not directly involved in the drafting process is the appeal.

Courts refuse to rewrite unconstitutional laws; a court should be loathe to write the law in the first place in the form of a substantive injunction. *See, Clark v. Community For Creative Non-Violence,* 468 U.S. 288, 299 (1984) ("we do not believe . . . that . . . the time, place or manner decisions assign to the judiciary the authority to replace [government officials] as the manager of [public forum property - here, parks]"); *Gregory v. Chicago,* 394 U.S. 111, 118 (1969) (Black, J., concurring) ("it is not our duty and indeed not within our power to set out and define with precision just what statutes can be lawfully enacted to deal with situations like the one confronted here by police and protectors . . . .").

Fourth, judicial creation of new substantive laws, by means of injunction, bypasses and denigrates the legislative function of elected, representative bodies. City councils and state legislatures have the task of enacting laws defining offenses and regulating conduct. If a city council

declines to enact a "First Amendment Free Zone", a court should not preempt this representative decision by passing the same restriction in injunctive form. Such misuse of the judiciary overburdens the court and encourages elected officials to evade responsibility by referring citizens' complaints to the court. *Cf., New York Times Co. v. United States,* 403 U.S. 713, 714 (1971) (Marshall, J., concurring) (Constitution does not provide for "government by injunction" by which courts may make law. . . . "); *Id.* at 731 (White, J., concurring) (prior restraint not justified, "at least in the absence of express and appropriately limited [legislative] authorization. . . . "). Consequently, the Court should determine that the constitutionally mandated separation of powers, and the above considerations, render substantive injunctions such as the one at issue here invalid.

III.

Since the Injunction is Not Narrowly Tailored, it is Invalid as a Prior Restraint on Speech

Enforcement of the "First Amendment Free Zones" of the Injunction involved herein against peaceful expression is an unconstitutional prior restraint. *See, e.g., New York Times Co. v. United States,* 403 U.S. 713 (1971); *Organization For a Better Austin v. Keefe,* 402 U.S. 415 (1971); *Near v. Minnesota,* 283 U.S. 697 (1931). To be lawful, a prior restraint "must fit within one of the narrowly defined exceptions to the prohibition against prior restraint." *Southeastern Promotions, Ltd. v. Conrad,* 420 U.S. 546 (1975). "Prior restraint on expression comes to this Court bearing

a heavy presumption against its constitutional validity." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963).

As discussed above, the peaceful expressive activity of Petitioners is protected by the First Amendment. Among other things, Petitioners openly make the public aware of their opposition to Respondents' performance of human abortions. The performance of human abortions was - and is - offensive to Petitioners, just as the views and beliefs of Petitioners are, no doubt, offensive to Respondents. "But so long as the means are peaceful, the communication need not meet [Respondents'] standards of acceptability." *Keefe*, 402 U.S. at 419. Indeed, as the Eleventh Circuit Court of Appeals indicated in the related case involving this same Injunction:

It is tempting, of course, to entertain the argument that the speech in this case is disruptive, discourteous, and offensive, but that is irrelevant. The Supreme Court recently reminded us:

> [a]s we have often had occasion to repeat, " '[T]he fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection.' "
> [Citations]
> " 'If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.' "
> [Citations]

> *Simon & Schuster v. New York Crime Victims Bd.* ___ U.S. ___, ___, 112 S.Ct. 501, 509, 116 L.Ed.2d 476 (1991). We protect much that offends in the name of free speech – we cannot refuse such protection to those who find abortion morally reprehensible.
> *Cheffer v. McGregor*, 6 F.3d 705 (11th Cir. 1993).

The Court spoke directly to this issue in *New York Times Co. v. United States*. That case established that speech on matters of public concern has an immunity from pre-publication restraints that is nearly absolute. In its opinion, the Court re-emphasized that "[any] system of prior restraints on expression comes to this Court bearing a heavy presumption against its constitutional validity." 403 U.S. at 714 (*citing Bantam Books* and *Near*). A proponent "thus carries a heavy burden of showing justification for the imposition of such a restraint." *Id., citing Organization For a Better Austin v. Keefe*, 402 U.S. 415 (1971).

Respondents have no right to be free from public criticism of their human abortion business. *See, e.g., Keefe*. "No prior decisions support the claim that the interests of an individual in being free from public criticism of his business practices . . . warrants use of the injunctive power of a court." *Id.* at 419.

> "An order issued in the area of First Amendment rights must be couched in the narrowest terms that will accomplish the pin-pointed objective permitted by constitutional mandate and the essential needs of the public order. In this sensitive field, the State may not employ 'means that broadly stifle fundamental personal liberties when the end can be more narrowly

> achieved.' [Citation]. In other words, the order must be tailored as precisely as possible to the exact needs of the case."
> *Carroll v. President & Comrs. of Princess Anne*, 393 U.S. 175 (1968).

As discussed above, the restraint here at issue is not narrowly tailored. It fails to differentiate between lawful and unlawful conduct, between violent and nonviolent conduct, and operates as a complete ban on speech within the "First Amendment Free Zones" established by the order.

Since the Injunction here at issue is not "couched in the narrowest terms that will accomplish the pin-pointed objective" or "tailored as precisely as possible to the exact needs of the case", it cannot constitutionally be permitted to stand.

IV.

The Four-Part *O'Brien* Test Does Not Justify the Injunction Here

The Court has observed that "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify *incidental* limitations on First Amendment freedoms." *United States v. O'Brien*, 391 U.S. 367 (1968) (emphasis added). After analyzing the various terms used to characterize the quality of governmental interest which must appear to justify such a regulation, the Court concluded:

> Whatever imprecision inheres in these terms, we think it clear that a government regulation is

> sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.
> 391 U.S. at 377.

As discussed above, a substantive injunction of the type here involved is, in essence, a legislative act. As such, it is not within the constitutional power of the government. U.S. Constitution, Article I, Section 1.[13] Accordingly, there is no justification for regulation of the speech here at issue.

The second part of the *O'Brien* test is that the regulation further an important or substantial governmental interest. The only governmental interests said to be furthered by the Injunction in this case are protection of a woman's freedom to seek abortion, insuring public safety and order, promoting the free flow of traffic on public streets and sidewalks, and protecting private property rights. *Operation Rescue, et al. v. Women's Health Center, Inc., et al.*, 626 So.2d 664, 672 (1993).

The interests asserted here do not justify the restriction. This Court has stated that free speech on issues of public concern lies at the core of the First Amendment, and on the highest rung of First Amendment protections

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[13] "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." U.S. Const. Art. I, Section 1.

(*NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982); *Carey v. Brown*, 447 U.S. 455, 467 (1980)). A "prior restraint on expression comes to this Court bearing a heavy presumption against its constitutional validity." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 71 (1963). Thus, while the interests articulated by the Florida Supreme Court as justifying the regulation may be valid interests in which a state may engage, they are by no means of sufficient import or substance to justify suppression of peaceful, lawful, speech.

Under *O'Brien*, to be justified, the regulation of expression must be unrelated to the suppression of free expression. *Texas v. Johnson*, 491 U.S. 397, 403 (1989). The Injunction here cannot meet this standard. Not only is it related to the suppression of free expression, its principal effect is to suppress free expression.

Finally, and most importantly, the *O'Brien* test requires that the restriction on First Amendment freedoms be incidental, and no greater than is essential to the furtherance of the governmental interest. As mentioned above, the interests are that of permitting women to obtain abortions, concerns about traffic, public safety and order, and protecting property rights. It is respectfully submitted that a total ban on the specified communicative activity on the public streets and sidewalks within the "First Amendment Free Zones" cannot be justified as a reasonable place restriction, or as essential to the furtherance of the articulated interests.

Just such a total ban on expression was overturned by this Court, stating, "We are convinced, however, that

the section, which totally bans the specified communicative activity on the public sidewalks around the Court grounds, cannot be justified as a reasonable place restriction primarily because it has an insufficient nexus with any of the public interests [sought to justify it]." *United States v. Grace*, 461 U.S. 171, 181 (1983) (footnote omitted). As the Court went on to state, "We do not denigrate the necessity to protect persons and property or to maintain proper order and decorum within the Supreme Court grounds, but we do question whether a total ban on carrying a flag, banner or device on the public sidewalks substantially serves these purposes." 461 U.S. at 182.

Like the statute banning such conduct in *Grace*, the ban on expressive conduct here is unconstitutional.

CONCLUSION

For the foregoing reasons, the decision of the Florida Supreme Court should be reversed.

Respectfully submitted,

Scott L. Thomas
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Law Center
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Tupelo, MS 38803
(601) 844-5036

APPENDIX A

[LOGO]
Liberty Counsel

February 11, 1994

Honorable William K. Suter
Clerk, United States Supreme Court
One First St., N.E.
Washington, D.C. 20543

RE: Judy Madsen, Shirley Hobbs and Ed Martin v. Women's Health Center, Inc., et al; Case 93-880

Dear Mr. Suter:

Pursuant to agreement between the Petitioners and Respondents, the undersigned in their representative capacities by their signature below agree to grant one another a general consent for the filing of amici briefs in support of either party. This letter and the signatures below represent consent registered with this court so that the Petitioners are consenting to the filing of any and all amici briefs by Respondents and Respondents are consenting to the filing of any and all amici briefs in support of the Petitioners.

Sincerely,

/s/ Mat Staver
Mathew D. Staver, Esq.
On behalf of Petitioners

/s/ Susan A. England
Susan A. England, Esq.
on behalf of
Respondents

MDS:psb

Post Office Box 540774 • Orlando, Florida 32854 •
Telephone (407) 875-2100 • Fax (407) 875-8008

[LOGO]
Liberty Counsel

January 25, 1994

Scott Thomas, Esq.
American Family Association
PO Drawer 2440
Tupelo MS 38803

RE: Judy Madsen, Shirley Hobbs and Ed Martin v. Women's Health Center, Inc., et al
Case 93-880

Dear Scott:

The undersigned is counsel of record for July Madsen, Ed Martin and Shirley Hobbs, the appellants in the above styled case. This letter serves as written consent for you to file an amicus brief on behalf of the appellants. The issue that we would like for you to brief involves *NAACP v. Claiborne Hardware* for the issue of lumping protected with unprotected speech. The appellants' Initial Brief is due to be filed in the Court on March 4, 1994, and the respondents' Brief is due to be served on April 1, 1994.

If you have any questions, please feel free to contact me.

/s/ Mat Staver
Mathew D. Staver, Esq.

MDS:psb
Enclosures

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APPENDIX B

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const., Amend. 1.